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No. 83-94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

S.S. "NANCY LYKES", her engines, boilers, etc., and LYKES BROS. STEAMSHIP COMPANY, INC.,
Petitioner,

—against—

GENERAL ELECTRIC COMPANY, INTERNATIONAL SALES DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF LYKES BROS. STEAMSHIP COMPANY, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

I

RESPONDENT FAILED TO RECOGNIZE THAT THE COURTS BELOW FOUND COGSA APPLIED IN THIS CASE AND IN SO DOING FAILED TO EXPLAIN WHY THE CLEAR LANGUAGE OF THE STATUTE SHOULD NOT BE FOLLOWED AS IT WAS IN A SEVENTH CIRCUIT CASE ON THIS ISSUE THUS THERE IS A CONFLICT BETWEEN THE CIRCUITS WHICH SHOULD BE RESOLVED BY THIS COURT.

Respondent's tired contention that no conflict exists between the circuits with respect to the applicability of the package limitation following the finding of an unreasonable geographical deviation, is without merit. The Seventh Circuit in *Atlantic Mutual Insurance Company* v. *Poseidon Schiffahrt, G.m.b.H.*, 313 F.2d 872 (7 Cir.), *cert. den.* 375 U.S. 819 (1963) held the package limitation applicable; the Second Circuit in the matter at bar held to the contrary.

The Seventh Circuit specifically based its decision on the express, clear "in any event" and "any loss or damage" language in section 1304(5) P. Br. D-7) of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* (1936) (hereinafter "COGSA") and because of the fact that the package limitation provision follows hard on the heels of section 1304(4) (P. Br. D-6), the deviation provision of the statute. It concluded that COGSA changed the pre-existing legal effect of a finding of an unreasonable deviation whereby the liability of the carrier became that of an insurer and held that a carrier has the right to the package limitation "in any event", *Atlantic Mutual, supra.*, at 874-875.

The Second Circuit ignored the "in any event" and "any loss or damage" language of § 1304(5) (P. Br. D-7) and held only that an unreasonable deviation deprives the carrier of the

COGSA package limitation (P. Br. A-17).* This is the conflict between the circuits.

That in *Atlantic Mutual, supra*, COGSA applied by its own force and effect and in the case at bar it applied as a matter of agreement between the parties, does not erase the diametrically opposed holdings of the two circuits with respect to whether COGSA changed the law. In both cases COGSA applied, albeit via different vehicles.[1] Where COGSA is applicable by its own force and effect, the law simply injects COGSA into the contract of carriage between the parties. Where COGSA does not automatically apply [46 U.S.C. § 1301(c)] the parties can make it applicable, as the court below found to be the case in the matter at bar (P. Br. A-15 n.7).

The implication of respondent's argument is, that, resolution of the sharp conflict between the two circuits depends upon the vehicle by which COGSA is made to apply. What respondent ignores is, that, the court below did not attach any legal significance to the distinction. And, in fact, according to the court below, the issue was: Whether an unreasonable deviation deprives the carrier of the benefit of the § 1304(5) liability limitation (P. Br. A-16). This was the identical issue before the Seventh Circuit in *Atlantic Mutual, supra*.[2] More-

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* All reference to "P.Br." are to petitioner's, Lykes Bros., brief and "R.Br." are to respondent's, General Electric brief. P.Br. followed by a letter (A,B,C,D and E) refers to the appendixes included in petitioner's brief with the appropriate reference to the pages in the particular appendix following the letter. All references to "R.App." appendix following the letter are to respondent's appendix.

1 The 1953 comment by Knauth, in *Ocean Bills of Lading*, 241 (4th Ed. 1953) cited in a footnote by respondent (R.Br. at 8n.2) is outdated. The *Atlantic Mutual* case *supra*. was decided ten years *after* the book was published. Moreover, the author in the sentence immediately preceding the quoted material states: "The cases are not particularly satisfactory."

2 Respondent's irrelevant speculation that the seventh circuit "would agree" that COGSA is ousted when it applies as a matter of contract, as here, stems from the dictum of the district court quoted in the Seventh Circuit opinion. The fact of the matter is that the issue was not before the Seventh

over, in this context, the court below made no attempt to distinguish the *Atlantic Mutual* case, *supra*, notwithstanding that it was clearly aware that the holding there was contra to its own as the "But see" reference to the *Atlantic Mutual* case *supra.*, in the lower court's opinion, makes clear (P. Br. A-16).

A reading of the court's opinion below establishes that its holding had nothing to do with the fact that in this case COGSA was not applicable by its own force. The Second Circuit held the way it did because it views deviations to be so serious a breach of the contract of carriage that "the carrier must be deprived of the protection of the § 4(5) liability limitation [P. Br. A-17]". By making what can only be characterized as a policy determination, the court below invaded the province of the legislature and read out of COGSA the "in any event" language of § 1304(5). In so doing, the lower court resolved an issue of federal law in a manner in conflict with the teachings of this Court.

As this Court stated in interpreting the Norris-LaGuardia Act, in *Sinclair Refining Company* v. *Atkinson*, 370 U.S. 195, 202-3 (1962):

> Moreover, the language of the specific provisions of the Act is so broad and inclusive that it leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself. We cannot ignore the plain import of a congressional enactment, particularly one which, as we have repeatedly said, was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction [footnotes omitted].

See, also *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961), *Packard Motor Co.* v. *NLRB*, 330 U.S. 485, 492 (1947).

Circuit. However, in the instant case, the issue was raised below and neither the district nor the circuit court held that COGSA was ousted.

The Second Circuit's decision also lacks logical consistency. The real issue is why should an unreasonable geographical deviation be treated different from any other breach. On the one hand the court below characterizes the failure on the part of a carrier to exercise due diligence to make a vessel seaworthy, i.e. the sending of an unseaworthy vessel, her cargo and personnel out to sea, as an "ordinary risk of shipping [P. Br. A-17]". But can it seriously be denied that such conduct is, at least, as "serious" and "fundamental" a breach of the carrier's undertaking as an unreasonable deviation (P. Br. A-17)? Yet, the carrier's failure to exercise due diligence to make the vessel seaworthy does not deprive it of the package limitation, *Iligan Integrated Steel Mills, et al.* v. *S.S. JOHN WEYERHAUSER*, etc., *et al.*, 507 F.2d 68 (2 Cir. 1974) *cert. denied*, 421 U.S. 965 (1975).

It is invalid to reason, as to the lower court did (P. Br. A-17), that an unreasonable geographical deviation exposes cargo to "unanticipated risks [P. Br. A-17]" An insured risk, on its face, is not an unanticipated risk (see discussion in P. Br. at 17). In the case of an uninsured cargo interest, it assumes the risk that the package limitation will apply as in the case of a loss occurring because of the carrier's failure to exercise "due diligence" to make a vessel seaworthy.

Respondent enumerates contrived considerations to justify ignoring the clear "in any event" language of § 1304(5) (P. Br. D-7). In so doing respondent, in essence, attacks every limitation of liability statute since by their nature such statutes are arbitrary. What respondent ignores is the fact that the Second Circuit's refusal to oust the package limitation following a finding of a carrier's failure to exercise "due diligence" to make a vessel seaworthy (*Iligan Integrated Steel Mills, supra*) confirms its recognition that limitation statutes are valid statements of public policy.

Noteworthy too, is the fact that the COGSA limitation of liability provision is not as arbitrary as it appears at first blush. It applies only in the case of goods shipped in packages or

customary freight units. Furthermore, the shipper can avoid limitation entirely by declaring the full value of the cargo.[3]

Most significantly however, the lower court's failure to recognize that COGSA worked a change in the pre-existing law is based upon a rationale that no longer exists. A loss following an unreasonable deviation no longer results in the denial of a cargo interest's insurance cover, a fact demonstrated by this case (see discussion in P. Br. at 16-20). If respondent did not make a full recovery from its cargo underwriter, as argued, it is only because respondent underinsured the shipment. Moreover, respondent also failed to declare the value of the shipment, an option that is available under COGSA § 1304(5) to carriers whether they be fully insured, partially insured or uninsured (P. Br. D-7).[4]

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3 General Electric inexplicably argues that by deviating, Lykes "chose under COGSA's sections 1304(5) and 1305 to increase its liabilities and responsibilities [R. Br. at 9]." Under 1304(5) (P. Br. D-7), a maximum amount of liability other than the one mentioned, may be fixed by agreement between the carrier, master or agent of the carrier and the shipper (P. App. D-7). No such agreement existed in the matter at bar. Under § 1305 (P. Br. D-8), a carrier may increase its liabilities "provided such surrender or increase shall be embodied in the bill of lading issued to the shipper [P. App. D-8]." There is no such writing in the bill of lading in this case.

4 Respondent's citation to the Harter Act and Limitation of Liability Act provisions, 46 U.S.C. §§ 181, 183-189, §§ 190 to 194 is misplaced. The Harter Act contains no package limitation provision, no option to declare a higher value on the part of the shipper and no "in any event" language. The Limitation of Liability Act provisions are dependent upon the absence of a finding of privity or knowledge on the part of an owner with respect to the cause of the loss, damage, injury or death. The COGSA package limitation provision, by its very terms, is available to the shipowner regardless of "privity or knowledge" such as in the case where the shipowner fails to exercise due diligence to make the vessel seaworthy, *Illigan Integrated Steel Mills, supra*.

II

RESPONDENT'S TRIVIAL ATTACKS ON PETITIONER'S STATEMENT OF THE CASE ARE NOTHING MORE THAN A PURPOSEFUL DISTRACTION FROM PETITIONER'S URGING THAT THIS COURT ESTABLISH GUIDELINES FOR THE DETERMINATION OF AN UNREASONABLE GEOGRAPHICAL DEVIATION UNDER COGSA

General Electric's taking issue with petitioner's presentation of the "Statement of the Case" is best resolved by referring to the citations to the record included in the appendices. However, certain accusations of "inaccuracies", "omissions" and "misstatements" on the part of Lykes (R. Br. at 1) deserve more specific consideration.

As much as respondent would like the record to read differently (R. Br. at 1), it indicates that General Electric's own witness testified that respondent's agent prepared the bill of lading. Moreover, the witness testified that it was "customary" for Lykes to supply the appropriate form and that Lykes had carried many of some earlier forty odd units that had been shipped (P. Br. E-18). Respondent conveniently omitted from its appendix (R. App. at 2a-4a) page 19 of the witness' testimony, relied upon and cited by petitioner in support of its contention that respondent had notice of the clauses contained in the bill of lading, including the clause permitting the vessel to call at any port for fuel oil (bunkering).

After bunkering, the NANCY LYKES departed from San Pedro bound for Japan on a modified great circle course. What respondent overlooks (R. Br. at 2) is that the weather expert who testified on its behalf at trial characterized the actual track of the vessel as appearing to be a great circle route.

> That appears to be a great circle route or a combination of a great circle to a junction point mid ocean, but it is

> certainly a great circle or very close to it, sir [trial transcript at 99].

Moreover, every layman knows that a great circle is the shortest distance between two points on the globe. In fact, an inspection of an exhibit introduced into evidence at trial by respondent, the pilot chart of the North Pacific Ocean for the period April 1978, depicts the shortest route from Panama to Japan, which passes close to the California coast (P. Br. E-25).

In addition, a second witness who testified on behalf of respondent at trial, stated that he had extracted several Panama Canal to Kobe routes from a governmental publication, entitled "Table of Distances Between Ports" to prepare an exhibit which respondent introduced at trial. It lists, among other things, the distance from the Panama Canal to Kobe on a great circle route and then a combination coastal and great circle route via Los Angeles (P. Br. E-6) (San Pedro is the port for Los Angeles).

In light of the information appearing in respondent's own exhibits and given the testimony of its own witnesses, can it be denied that the great circle route satisfies the lower court's definition of "customary", i.e., "established and by all means published to the world [P. Br. A-11]?"

Respondent's belated attempt to discredit its own exhibit, the April 1978 Pilot Chart for the North Pacific Ocean, (P. Br. E-25) obviously because it supports petitioner's contention that at most there was only a one or two percent greater chance of encountering adverse weather on the actual route (P. Br. at 516) is particularly illuminating (R. Br. at 4). It states under "average conditions of wind and weather over the North Pacific Ocean during April":

> *Gales*—Gales have slackened considerably by April. A maximum frequency of 8-13 percent occurs along the Aleutian Islands from Umak Island to Southern Kamchatka. Just west of midocean this area of gales dips just southward to the latitude of Yokohama and just south of

> the Alaska Peninsula is a small area where gales occur 8 percent of the time. *South of 35°N gales are not encountered more than 4 percent of the time.* [P. Br. E-25, emphasis added].

Thus, contrary to respondent's contention, the pilot chart specifically delineates the areas of the Pacific Ocean that are involved with respect to the statistical probability of encountering gale force winds.

Furthermore, the information appearing on the pilot chart is anything but "out-dated", as respondent would have this Court believe. It incorporates updated information that is presented to the Defense Mapping Agency Hydrographic Center which in turn publishes the chart. As indicated in the notes appearing on the chart, it is also prepared from data furnished by the United States Naval Oceanographic Office and Environmental Data and Information Service, National Oceanic and Atmospheric Administration (P. Br. E-25). In fact, the reliability of the pilot chart is further confirmed by the respondent's weather expert at trial. He testified: "It is a commonly used chart both to the mariner aboard the vessel and to the voyage planning people as well as to the shiprouter" and that "I would have used it, yes [trial transcript at 65, 66]"[5]

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5 The remaining alleged inaccuracies, omissions and misstatements are likewise without foundation. In this same context, it is interesting to note that the party taking liberties with the record is General Electric. For example, and in addition to those instances referred to above, a reading of the portion of the chief mate's testimony cited by respondent (R. Br. at 1a) does not support its statement in connection therewith (R. Br. at 3). Similarly, despite respondent's statement at R. Br. 10, there is nothing in the record in connection with deviation insurance on the part of carriers.

CONCLUSION

Respondent cites to five cases where certiorari was denied, allegedly in similar matters involving the same issues. Only one of the five, *Atlantic Mutual Insurance Company* v. *Poseidon Schiffahrt*, 313 F.2d 872 (7th Cir.), *cert. denied* 375 U.S. 819 (1963), involved the same issue herein presented, and it was correctly decided, as discussed above. Of the remaining four, two involved so called quasi-deviation issues, i.e., where cargo is carried on deck despite a promise to carry it underdeck and thus a unique type of near fraud, and the other two are pre-COGSA cases. Moreover, the finding of an unreasonable deviation in the circumstances of this case is an unfair decision inflicting a harsh blow on the shipping industry and particularly on one of the few remaining American flag operators. For all of the foregoing reasons this case stands as a perfect candidate for the granting of review by this Court and it is respectfully urged that the petition for a writ of certiorari be granted.

Dated: New York, New York
August 29, 1983

Respectfully submitted,

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